Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
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MEMORANDUM OPINION AND ORDER ON REMAND

Adopted: December 17, 1999 Released: December 23, 1999

By the Commission:

1. In this *Memorandum Opinion and Order on Remand*, we address the construction requirements imposed on incumbent licensees in the 800 MHz Specialized Mobile Radio (SMR) service that have received authorizations to construct wide-area systems. This action is taken in response to the order by the United States Court of Appeals for the District of Columbia Circuit in *Fresno Mobile Radio, Inc., et al. v. Federal Communications Commission*,[1] which remanded for further consideration our prior decision to maintain the requirement that incumbent licensees who had received "extended implementation" authorizations must construct and operate all sites at all frequencies within a certain period or lose the unconstructed frequencies.[2] For the reasons described herein, we will allow incumbent wide-area 800 MHz SMR licensees who were within their construction periods at the time of the *Fresno* decision to apply construction requirements similar to those given to Economic Area licensees in the 800 MHz band.

I. BACKGROUND

A. Construction Requirements for Incumbent Wide Area 800 MHz SMR Licensees

2. Prior to December 1995, when the Commission amended its 800 MHz SMR rules to provide for geographic area licensing,[3] 800 MHz SMR licenses were awarded on a site-by-site,

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[1] *Fresno Mobile Radio, Inc., et al. v. Federal Communications Commission*, 165 F. 3d 965 (D.C. Cir., Feb. 5, 1999).

[2] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 9972, 9997, ¶ 81 (1997) (*800 MHz Reconsideration Order*).

[3] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and

channel-by-channel basis. Licensees of conventional SMR systems were required to construct and operate their systems within eight months, while licensees of trunked systems had one year to construct and commence operation.[4] If a licensee failed to construct and begin operation on all authorized frequencies at a particular site, the unconstructed frequencies would automatically cancel.[5] Recognizing that a number of SMR licensees were using multiple contiguous site-specific licenses to create wide-area systems, the Commission in 1991 began granting these licensees extended implementation (EI) authority to construct their systems, whereby the licensee would have up to five years to construct all of the facilities within the wide-area "footprint" established by its licenses.[6] At the end of the EI period, any frequency licensed at a specific site within the footprint that was not fully constructed and in operation would cancel automatically.[7]

3. In 1993, Congress amended Section 332 of the Communications Act of 1934, created a new category of mobile services known as commercial mobile radio services (CMRS), and directed that providers of substantially similar CMRS services be governed by comparable regulation.[8] Consequently, the Commission initiated the *CMRS* proceeding to adopt rules implementing the new statutory framework.[9] In that proceeding, the Commission determined that interconnected SMR services fell within the new CMRS classification.[10] The Commission further concluded that interconnected 800 MHz SMR licensees competed (or had the potential to compete) with other existing and planned wide-area CMRS providers, such as cellular and broadband PCS licensees, and, therefore, should be subject to comparable regulation.[11]

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322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 1463 (1995) (*800 MHz Report and Order*).

4 47 C.F.R. § 90.631(f) (trunked systems given one year to construct); 47 C.F.R. § 90.633(d) (conventional systems given eight months to construct).

5 *Id.*

6 Initially, the Commission granted multi-year extended implementation periods to SMR licensees by waiver when the licensees met the waiver standard by demonstrating that their proposed systems differed sufficiently from conventional systems to make normal construction standards inapplicable. *See* Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd. 1533 (1991), *recon. dismissed*, 6 FCC Rcd 6989 (1991). In 1993, the Commission amended section 90.629 of the rules to allow SMR applicants to request up to five years to construct systems that required extended implementation because of wide-area coverage, size, or complexity. *See* Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, *Report and Order*, 8 FCC Rcd. 3975 (1993). *See also* 47 C.F.R. § 90.629(e).

7 *See* 47 C.F.R. § 90.629(e).

8 *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993), codified at 47 U.S.C. § 332.

9 *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No 93-252, *Notice of Proposed Rulemaking*, 8 FCC Rcd. 7988 (1993).

10 *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No 93-252, *Second Report and Order*, 9 FCC Rcd. 1411, 1448-58 (1994).

11 *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No 93-252,

Consequently, the Commission adopted a new, geographic-based licensing scheme for the 800 MHz band with contiguous spectrum blocks throughout defined service areas awarded to single licensees on an exclusive basis.[12] The Commission also determined that with respect to CMRS systems licensed on a wide-area basis, the record generally supported use of longer construction periods combined with flexible coverage requirements that required licensees to provide coverage only to a fixed percentage of their licensing areas in order to retain the license for the entire area.[13]

4. While seeking comment on the new geographic-based licensing scheme for 800 MHz SMR service, the Commission also questioned how the prior procedure of granting extended implementation authority to site-based 800 MHz licensees with wide-area systems would fit into the new licensing scheme.[14] Specifically, the Commission asked whether existing EI licensees should maintain their original extended implementation periods or have their construction periods accelerated unless they demonstrated that their construction to date was consistent with their original implementation plan and that the plan was still in the public interest.[15]

5. In December 1995, the Commission adopted a new wide-area licensing scheme by creating geographic-based licenses (Economic Area, or EA, licenses) for the upper 200 channels of the 800 MHz SMR band.[16] As part of the new licensing scheme, the Commission adopted construction and coverage requirements for EA licensees similar to those required of broadband PCS and 900 MHz SMR licensees.[17] Specifically, the Commission required EA licensees on the upper 200 channels to construct their systems within five years of licensing.[18] The Commission

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Third Report and Order, 9 FCC Rcd. 7988, 8042-43 (1994).

12 *Id.* at 8042, ¶ 94.

13 *Id.* at 8076, ¶ 179. We noted that this approach had been used for cellular service and had recently been adopted for broadband and narrowband PCS. *Id.*

14 *Id.* at 7997, ¶ 47.

15 *Id.*

16 *800 MHz Report and Order*, 11 FCC Rcd. at 1479-80. The " upper 200 channels " consist of 200 paired channels (Channel Nos. 401-600) at 816-821/861-866 MHz. The "lower 230 channels" are a combination of the General Category channels and "lower 80" channels. The General Category channels consist of 150 paired channels (Channel Nos. 1-150) at 806-809.750/851-854.750 MHz. The "lower 80" channels consist of 80 paired channels at 811-815.700/856-860.700 MHz (Channels Nos. 201-208, 221-228, 241-248, 261-268, 281-288, 301-308, 321-328, 341-348, 361-368, and 381-388).

17 *Id.* at 1521, ¶ 104.

18 *Id.* The Commission noted that the five-year construction period is shorter than that imposed on PCS systems, but concluded that it was the most appropriate time period for the 800 MHz SMR service because incumbent SMR licensees were able to request up to five years to construct a wide-area system and a substantial level of construction already existed in the 800 MHz band. *Id.* Moreover, the five-year construction period would apply to all of the licensee's stations within the EA spectrum block, including any stations previously subject to an earlier construction deadline. *Id.* The Commission recognized that this may give some EA licensees more time to construct certain facilities than otherwise might have been allowed, but nonetheless concluded that EA licensees should have this flexibility. *Id.*

also imposed "interim coverage requirements," which required an EA licensee to provide coverage to one-third of the population within its licensing area within three years after the initial license grant and to two-thirds of the population by the end of the five-year construction period.[19] In addition, in order to decrease the possibility of non-competitive spectrum warehousing, the Commission required EA licensees in the upper 200 channels to construct and maintain operation of 50 percent of the total channels of their respective spectrum blocks in at least one location in their EAs within three years of initial license grant.[20] Moreover, the Commission decided against adopting a substantial service benchmark for EA licensees in the upper 200 channels.[21]

6. In addition to creating rules for the new EA licensees, the Commission also concluded that continuation of the prior site-based extended implementation licensing process would be contrary to the new wide-area licensing plan because the EA licensees were required to meet construction requirements based on population coverage and channel usage, regardless of incumbent presence.[22] The Commission reasoned that if an incumbent SMR licensee could hold certain channels unconstructed for a number of years, the EA licensee would be prevented not only from directly utilizing these frequencies (*i.e.*, by buying them at auction) but also from acquiring them from the incumbent due to the prohibition against the transfer of unconstructed facilities.[23] In addition, the Commission noted that some incumbent licensees who had obtained extended implementation authority several years previously had not constructed any facilities, possibly resulting in spectrum warehousing.[24]

7. To address these concerns, the Commission decided to stop accepting new applications for extended implementation authority and dismissed all pending applications.[25] The Commission also required licensees who had previously obtained EI authorizations to rejustify their authorizations by demonstrating that continuing to maintain their extended time to construct their facilities was warranted and in the public interest.[26] If a wide-area licensee's rejustification

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[19] *See* 47 C.F.R. § 90.685(b).

[20] *800 MHz Report and Order* at 1529, ¶ 121. *See also* 47 C.F.R. § 90.685(c).

[21] *800 MHz Report and Order* at 1529, ¶ 120.

[22] *Id.* at 1524.

[23] *Id.*

[24] *Id.* at 1525.

[25] *Id.* at 1524-25. The Commission's dismissal of the pending EI applications was upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir., 1997).

[26] *Id.* at 1525. Specifically, a licensee seeking to retain EI authority was required to: (1) indicate the duration of its EI period (including commencement and termination date); (2) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (3) demonstrate its compliance with 47 C.F.R. § 90.629 if authority was granted pursuant to that provision, including confirmation that it had filed annual certifications regarding fulfillment of its implementation plan; and (4) certify that all facilities covered by the EI authority proposed to be constructed as of the adoption date of the *800 MHz Report and Order* were fully constructed and that service to subscribers had commenced. *Id.* The Commission then delegated the Bureau with the authority

of EI authority was found sufficient, the Commission would give the licensee two years from the decision to construct and begin operation, or maintain its original construction deadline, whichever was earlier.[27] If the rejustification was not approved, the licensee's EI authorization would be terminated, and the licensee would be given six months from the termination date to complete construction of its site-based facilities.[28] In May and November 1997, the Wireless Telecommunications Bureau (Bureau) acted on the rejustification submissions filed by thirty-seven wide-area licensees.[29] Of the thirty-seven submissions, the Bureau approved thirty-one, including the rejustification submission of Southern Company, one of the petitioners in *Fresno Mobile Radio, Inc. v. F.C.C.* The Bureau rejected the remaining six rejustification submissions because these licensees had not constructed any facilities during the period of extended implementation.[30]

8. In the *800 MHz Reconsideration Order* adopted in June 1997,[31] the Commission generally affirmed the EA licensing system it had adopted for the upper 200 channels.[32] The Commission also affirmed its decision that rejustified EI licensees would receive a maximum of two years to complete construction of their facilities, and that any site-specific license within a licensee's wide-area "footprint" that was not constructed by the two-year deadline would be

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to review and take appropriate action upon such showings. *Id.*

27 *Id.*

28 *Id.*

29 *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Order*, 13 FCC Rcd. 1533 (WTB 1997), *recon.*, 12 FCC Rcd. 18349 (WTB 1997) (collectively, *800 MHz Rejustification Orders*).

30 *Id.*

31 Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-252, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 9972 (1997) (*800 MHz Reconsideration Order*).

32 Also in June 1997, the Commission adopted the same basic construction requirements for EA licensees in the lower 230 channels: one-third coverage within three years, two-thirds within five years. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act – Regulatory Treatment of Mobile Services, GN Docket No 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 12 FCC Rcd. 19079, 19094-95, ¶ 34. (1997) (*800 MHz Second Report and Order*). The Commission decided, however, to allow EA licensees in the lower 230 channels to demonstrate substantial service within five years of license grant in lieu of the specific coverage requirements. *Id.* Moreover, the Commission declined to adopt a channel usage requirement for licensees in the lower 230 channel block. *Id. See also* 47 C.F.R. § 90.685(b).

automatically cancelled, with the unconstructed frequencies reverting to the EA licensee.[33] The Commission rejected the claim made by Southern that the two-year construction requirement for site-based EI licensees, which required full construction of all facilities, was unfairly discriminatory in comparison to the five-year build-out period for EA licensees, which required only partial coverage of the EA licensing area.[34] The Commission explained that the two-year construction period for EI incumbent licensees was appropriate because incumbents were authorized to build and operate only at particular sites on specified channels, whereas EA licensees were licensed to build multiple sites throughout a Commission-defined geographical area.[35] The Commission added that the competitive bidding process for EA licensees provided incentives for EA licensees to build out quickly, thus reducing the likelihood that a longer construction period would lead to spectrum warehousing.[36] On September 26, 1997, Southern petitioned the United States Court of Appeals for the District of Columbia for review of the Commission's decision in the *800 MHz Reconsideration Order* not to give incumbent wide-area SMR licensees the same construction requirements given to EA licensees.

B. *Fresno Mobile Radio, Inc. et al. v. F.C.C.*

9. On February 5, 1999, in *Fresno Mobile Radio, Inc. v. F.C.C.*, the United States Court of Appeals for the District of Columbia held that the Commission had not adequately explained why incumbent wide-area SMR licensees were not allowed to apply the same coverage requirements as EA licensees, cellular licensees, or PCS licensees, given that they are substantially similar CMRS providers.[37] Because both incumbent and EA licensees must build a multitude of sites throughout an entire geographic area, the court decided that the Commission's view that these licensees are licensed differently "elevates form over function."[38] The court also rejected the Commission's argument that EA licensees who must pay for their licenses at auction have a greater incentive to construct than incumbent licensees who acquired their licenses for free.[39] A licensee, the court held, has the same incentive to construct no matter how it acquires the license if "the additional revenue it expects to earn from doing so exceeds the additional cost it must incur to do so."[40] The court found the Commission had not fully considered whether incumbent wide-area licensees are sufficiently different from 800 MHz EA licensees, cellular licensees and PCS licensees to justify the different requirements, and therefore, remanded the matter to the Commission to reconsider the issue.[41] In the interim, the court ordered that

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33 *800 MHz Reconsideration Order* at 9997, ¶ 81.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Fresno* at 969-70.

38 *Id.* at 970.

39 *Id.*

40 *Id.*

41 *Id.*

Southern Company should not be denied the benefit of the more liberal construction requirements applicable to EA licensees.[42]

10. In light of the *Fresno* decision, the Bureau temporarily suspended the construction timetable for incumbent 800 MHz licensees whose EI rejustifications were approved by the Bureau in 1997.[43] The Bureau then sought comment on whether the Commission should retain existing EI construction requirements, adopt new construction requirements for EI licensees that would be comparable to EA licensees' requirements, or consider some other alternative.[44] The Bureau asked that parties who supported the Commission's decision explain fully why the agency's approach was reasonable, and that those advocating new construction requirements provide details on what the new requirements should be.[45] The Bureau specifically asked that suggestions for new construction requirements take into account the differences in the ways the Commission licensed wide-area 800 MHz systems, and address how coverage should be determined, when the construction period should start and how long it should run, and if constructing a minimum number of frequencies would be necessary for a licensee to be considered to be "providing coverage."[46] In response, we received six comments and three reply comments.[47]

II. DISCUSSION

11. None of the comments received in response to the Bureau's *Comment PN* support the Commission's decision in the *800 MHz Reconsideration Order* to maintain the existing construction requirements for incumbent wide-area SMR licensees (*i.e.*, requiring build-out of all authorized sites on all frequencies).[48] In its comments, Southern points to the *CMRS* proceeding

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42 *Id.*

43 *See* Wireless Telecommunications Bureau Temporarily Suspends Construction Timetable for Wide Area 800 MHz SMR Licensees Due to Court Remand, *Public Notice*, 14 FCC Rcd. 6348 (1999) (*Tolling PN*).

44 *See* Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc. v. FCC*, *Public Notice*, 14 FCC Rcd. 7799 (1999) (*Comment PN*). This Public Notice was subsequently published in the Federal Register, *see* "Comments Requested on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees," 64 FR 31532 (June 11, 1999). Thereafter, the Bureau extended the comment period. *See* New Deadlines for Filing Comments on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees, *Public Notice*, DA 99-1168 (rel. Jun. 5, 1999).

45 *Comment PN* at 7799-7800.

46 *Id.* at 7800.

47 *See* Appendix A for list of comments and reply comments. Southern Company also submitted additional information. *See* Letter from Carole C. Harris, counsel for Southern Company, to Scott Mackoul, Wireless Telecommunications Bureau, dated September 22, 1999 (*Southern Ex Parte*).

48 *See* AMTA at 8; Chadmoore at 8-9; Nextel at 8; Southern at 10; Russ Miller at 5. In addition, the comments submitted by Mobile Relays advocate adopting EA-type construction requirements as an alternative to the original site-by-site, frequency-by-frequency construction requirements. Mobile Relays at 5.

as evidence that the Commission has already determined that all CMRS licensees should have similar coverage requirements, and that there is no rational basis for singling out incumbent wide-area 800 MHz SMR licensees as the only CMRS providers that are not entitled to flexible coverage requirements.[49] Nextel adds that maintaining site-by-site requirements not only violates regulatory parity, but is also inconsistent with the real-world operating parameters of integrated wide-area systems that use multiple low-power, low-site cells.[50] In fact, Nextel contends, requiring a wide-area SMR licensee to construct and operate every licensed channel at every licensed site can result in intra-system interference and prevent efficient frequency re-use.[51]

12. On the basis of the record, we conclude that SMR licensees granted extended implementation authority are sufficiently similar to EA licensees that they should have similar flexibility with respect to construction requirements. The record on remand demonstrates that incumbent wide-area SMR licensees such as Southern do provide service that is similar, if not identical, to that provided by EA licensees and other CMRS providers. Recognizing that these licensees may have constructed their systems in accordance with the requirements in place at the time (*i.e.*, site-by-site, frequency-by-frequency), we will give eligible wide-area SMR licensees the option of complying with the terms of their EI authorizations or applying the EA construction requirements to their wide-area systems. We believe that giving incumbent wide-area SMR licensees the choice between applying the site- and frequency-specific requirements and the EA coverage requirements establishes reasonable parity between incumbent wide-area SMR licensees and EA licensees, without prejudicing the interests of either, and will provide the 800 MHz service with a degree of certainty for both current and future EA licensees.

13. **Construction Period.** When an eligible wide-area licensee elects to apply the EA construction requirements to its system, the five-year construction period shall begin from the grant date of its extended implementation authority ("EI grant") because that date is most analogous to the initial grant date of an EA license. We note that most comments favored starting the five-year period from the effective date of this proceeding.[52] However, in light of the fact that all of the current EI incumbents have already had several years to build out their systems, we believe that adding five more years to their build-out periods on a cumulative basis would give incumbent wide-area SMR licensees an inequitable advantage over EA licensees. Moreover, eligible EI licensees will not be harmed by having the five years run from the date of EI grant because this alternative is still more flexible than the rules they have been operating under, which required them to construct all sites on all frequencies. Under the more flexible EA requirements, an eligible EI licensee will now be able to leave certain sites and frequencies unconstructed for potential future use. Finally, starting the EA construction period from the grant of EI authority provides a degree of certainty for EA licensees in the upper 200 channels that will soon be coming on their own three-year benchmark (which must be met regardless of the level of incumbency) and for bidders in the future auction of EA licenses in the lower 230 channels. A

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49 Southern at 5-8.

50 Nextel at 7.

51 *Id.*

52 *See e.g.*, AMTA at 8; Nextel at 10; Southern at 11. We note that Russ Miller requested that the start date should begin the later of the effective date of the new construction requirements or the date all pleadings with respect to outstanding wide-area applications are resolved. Russ Miller at 6.

start date sometime after the EI grant would create an unnecessary level of uncertainty and give EI licensees more than what EA licensees have. Therefore, we will start the construction period for those eligible licensees who choose the EA construction requirements from the date of EI grant.

14. Because we will start the construction period from the date of EI grant, which for all eligible EI licensees occurred more than three years ago, we will not require EI licensees to meet the interim three-year coverage requirement. Instead, we believe that the public interest will be satisfied by requiring that the eligible wide-area licensee meet the ultimate construction requirements that EA licensees must meet. Therefore, an eligible wide-area SMR licensee that elects to apply the EA construction requirements must have constructed and placed into operation a sufficient number of base stations to provide coverage to at least two-thirds of the population of its wide-area system within five years of EI grant plus the tolling period described below. In addition, a wide-area licensee exercising this option must demonstrate that it has constructed fifty percent of its total authorized upper 200 channels within its wide-area system. On the other end of the spectrum, an incumbent wide-area licensee that is authorized for frequencies in the lower 230 channels and chooses the EA requirements may elect to demonstrate that it is providing substantial service within five years of EI grant, in lieu of the specific population coverage requirements, for those frequencies.[53]

15. **Effect of Tolling on Construction Deadline.** By this *Memorandum Opinion and Order*, we hereby terminate the temporary suspension of the construction timetable for incumbent wide-area 800 MHz SMR licensees that was instituted by the Bureau's *Tolling PN*. For all licensees entitled to relief under this decision, we will add 321 days to their construction periods, representing the amount of time between the *Fresno* decision and the release of this order. Therefore, the applicable construction deadline for any eligible incumbent wide-area SMR licensee that elects to apply the EA coverage requirements shall be five years from the date of EI grant plus 321 days. Likewise, the applicable construction deadline for incumbent wide-area SMR licensees that do not elect the EA requirements shall be 321 days after the EI deadline established in the *800 MHz Rejustification Orders*.

16. **Certification Filing.** An incumbent wide-area 800 MHz SMR licensee that was within its construction period at the time of the *Fresno* decision must certify in a filing with the Bureau that it either met the EA construction requirements, as set out herein, or complied with the terms of its EI authorization. In addition to the certification, if a licensee chooses to meet the EA requirements for frequencies in the lower 230 channels using the substantial service option, it must demonstrate in the same filing with the Bureau how it is providing substantial service. All filings must be made within fifteen (15) days after the licensee's applicable construction deadline, as defined *supra*, or sixty (60) days after the publication of this *Memorandum Opinion and Order on Remand* in the Federal Register, whichever is later.[54]

17. **Class of Licensees Affected.** The *Fresno* court ordered that the petitioner in the

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[53] If a licensee has frequencies in both the upper 200 and lower 230 channels and chooses to demonstrate substantial service for the lower 230 channels, it must still meet the specific coverage requirements for the upper 200 channels, using the population covered under those sites authorized with upper 200 frequencies.

[54] *See* 47 C.F.R. § 1.946(d).

case, Southern Company, not be denied the benefit of EA-type construction requirements while the matter is pending before the Commission.[55] The court did not, however, indicate what, if any, class of similar licensees should be accorded interim coverage requirements if the Commission reversed its decision. For the reasons discussed below, we extend the relief contained in this order to all 800 MHz licensees, such as Southern, who were granted extended implementation authority and were within their construction period at the time of the *Fresno* decision.

18. Two of the commenters, Chadmoore and Mobile Relays, respectively, urge the Commission to apply EA-type construction requirements to either an expanded or a narrower class of licensees. Chadmoore argues that the Commission should extend the new construction requirements retroactively to any 800 MHz SMR incumbent licensee that has ever sought EI authority, whether or not it was granted.[56] Chadmoore argues that had such licensees been given the same liberal coverage requirements applicable to EA licensees, their licenses would not have been cancelled.[57] Chadmoore urges the Commission to reinstate these licenses and allow the licensees to demonstrate that they have met the interim coverage requirements.[58] Conversely, Mobile Relays urges the Commission to limit EA-type construction requirements to 800 MHz SMR frequencies held by wide-area licensees that have requested wide-area authorizations as part of a plan to convert and upgrade existing, analog SMR systems.[59]

19. We conclude that all 800 MHz SMR licensees that have been granted extended implementation and were within their construction periods at the time of the *Fresno* decision should be given the opportunity to apply EA-type requirements. We decline to apply the EA-type construction requirements retroactively, as Chadmoore suggests. This would require reinstating licenses that have previously reached the expiration of their construction periods and been

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55 We believe that we have effectively met this directive by temporarily suspending the construction timetable for all commercial wide-area 800 MHz SMR licensees. *See Tolling PN.*

56 Chadmoore at 9. Chadmoore's proposal would include 800 MHz licensees whose construction periods have already expired because they were denied extended implementation in the first instance (such as Chadmoore) or who failed to rejustify their extended implementation authority (such as the Roberts Group). *Id.*

57 *Id.*

58 *Id.* Chadmoore contends that retroactive reinstatement of cancelled wide-area licenses would not be unduly burdensome to EA licensees because they were on notice at the time of the auction that many issues, including construction deadlines, were still being adjudicated and could ultimately affect their use of certain channels. *Id.* at 10.

59 Mobile Relays at 2-3. Mobile Relays's proposal would exclude any authorizations originally designated as Business and Industrial Land Transportation (B/ILT) frequencies, but converted to SMR use through inter-category sharing. Mobile Relays argues that B/ILT frequencies "held by an auction winner are not held as the result of any auction, and must be constructed consistent with the licensee's pre-existing waiver." *Id.* Mobile Relays also notes that any B/ILT frequencies held by a wide-area SMR licensee are held pursuant to 47 C.F.R. § 90.621(f)(2) which specifies that the out-of-category licensee must operate by the rules applicable to the category to which the frequency is allocated. *Id.* at 2-3. The proposal would also exclude licensees who as yet have not constructed any authorizations but seek to construct a digital wide-area system "from scratch." *Id.* at 3-4. Mobile Relays argues that the former is far more costly and difficult because the licensee must maintain existing service and therefore, should have the more liberal EA-type construction requirements. *Id.*

cancelled for failure to construct, in most cases over two years ago. We do not believe that reinstating these licenses would be in the public interest. First, reinstatement would be a windfall to licensees who have already had a full opportunity to construct under the prior rules, and have neither sought additional time to construct nor justified an extension. Second, the cancellation of these licenses has already been relied upon by EA licensees in the upper 200 channels, who in many instances may have constructed and begun operation on those frequencies. Third, as to the lower 230 frequencies, which will be auctioned in the coming year, reinstatement of cancelled licenses would create significant uncertainty for potential EA licensees because they would have to wait several years for the reinstated incumbent to meet its build-out requirement before they would know what spectrum in their EAs they could use. We believe these considerations are contrary to our goal of using EA licensing to improve the efficiency of the SMR licensing process and to expedite the development of wide-area SMR service.

20. We agree with Mobile Relays's suggestion that the relief in *Fresno* apply only to SMR frequencies. The *Fresno* court's decision specifically involves SMR frequencies,[60] and the construction status of non-SMR frequencies, including Business and Industrial/Land Transportation frequencies converted under inter-category sharing for SMR use, is beyond the scope of this proceeding.[61] However, we disagree with Mobile Relays's argument that relief should be limited only to EI licensees who are converting from analog to digital systems. We see no basis either in the record or in our rules for such a limitation.

21. **Area of Coverage.** When determining if an eligible wide-area SMR licensee has met a specific coverage requirement (*i.e.*, covering one-third or two-thirds of the population), the population should be measured using the licensee's wide-area "footprint" as established in the licensee's rejustification submission. We agree with Nextel that this will permit wide-area licensees to continue construction and operation based on the boundaries used to design their systems.[62] Furthermore, we adopt Southern's suggestion that a wide-area licensee compute population covered within its footprint on a county basis using 1990 U.S. Census information.[63] In cases where the footprint does not align with county boundaries, a wide-area licensee should include the entire population of the county if the licensee covers any portion of it. We agree with Southern that this will ensure that there will be no underreporting of population, while at the same time providing a method that can readily be verified.[64]

22. **Minimum Number of Frequencies.** As noted earlier, an EA licensee in the upper 200 channels of the 800 MHz band must construct and operate fifty percent of the total channels included in its spectrum block in at least one location in its respective EA-based service area

60 *Fresno* at 967-69.

61 We note that Bureau has already granted Southern Company an extension of its extended implementation period for its Business and Industrial/Land Transportation channels until final rules regarding licensing of the I/LT frequencies in the context of the Commission's rulemaking proceeding to implement the Balanced Budget Act of 1997 take effect. *See* Southern Company, *Memorandum Opinion and Order*, 14 FCC Rcd. 1851 (WTB 1998).

62 Nextel at 10.

63 *Southern Ex Parte* at 1.

64 *Id.* at 2.

within three years of initial license grant and retain such channel usage for the remainder of the five-year construction period ("channel use requirement").[65] We will require that wide-area licensees that elect to apply the EA construction requirements also meet such a requirement for those frequencies within their extended implementation authority that are in the upper 200 channels. This requirement was adopted to prevent spectrum warehousing, and is meant to guarantee that at least fifty percent of the channels are in operation somewhere within the licensee's service area.[66] We note that the responses to the Bureau's *Comment PN* generally disfavor imposing the channel use requirement for incumbent wide-area licensees.[67] However, we interpret the channel use requirement for EA licensees in the upper 200 channels differently than the comments suggest. Instead of requiring fifty percent of the licensee's authorized channels to be constructed and in operation at one site, we interpret the requirement to mean that a licensee must construct and operate fifty percent of the channels throughout its licensed area, so that the aggregate number of channels in use is fifty percent of those authorized. The licensee may choose to meet the channel use requirement at one site, but may also choose to use any number of sites (but at least one site). Based on this interpretation, we believe that incumbent wide-area licensees are capable of meeting this requirement. Therefore, those incumbent wide-area licensees that do elect to apply EA construction requirements must also meet the same channel use requirement for their upper 200 channel frequencies that EA licensees in the upper 200 channels must meet.[68]

23. In addition to the channel use requirement imposed on upper 200 channel EA licensees, Mobile Relays recommends that the Commission require that incumbent wide-area licensees demonstrate service by a minimum of two frequencies at each site.[69] We agree with the reply comments, however, that there is no justification for the two-frequency minimum,[70] and that it would not provide regulatory parity between wide-area and EA licensees.[71] Incumbent wide-

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[65] *See* 47 C.F.R. § 90.685(c). As noted above, 800 MHz EA licensees in the lower 230 channels do not have such requirement, but only need to construct and operate one frequency within their EAs.

[66] *See 800 MHz Report and Order* at 1529, ¶ 121.

[67] AMTA at 8; Southern at 12; Russ Miller at 6; Nextel Reply at 4-5; and Chadmoore Reply at 5. For example, Southern states that it would be nearly impossible for an incumbent wide area licensee to construct fifty percent of its licensed channels at one site due to the fact that the sites were originally licensed on a site-by-site basis and site-by-site licensees do not have a uniform number of channels at each site and do not have the right to relocate other licensees within their service area. Southern at 12. Nextel agrees with Southern and adds that any attempt to enforce the 50 percent channel use requirement in a non-EA environment would be cumbersome at best. Nextel Reply at 4-5. Chadmoore also agrees with Southern's position and adds that a one channel minimum would give licensees the flexibility to construct their systems in accordance with market demand. Chadmoore Reply at 5.

[68] In light of the fact that we are dispensing with the interim three-year benchmark for incumbent EI licensees that elect to apply the EA coverage requirements, we will only require that the incumbent EI licensee certify its compliance with the channel use requirement for its upper 200 channel frequencies at its five-year construction benchmark.

[69] Mobile Relays at 5. Mobile Relays explains that two channels are necessary to construct a trunked radio system which is commonly used in a wide-area system. *Id.*

[70] Chadmoore Reply at 6; Southern Reply at 3.

[71] Nextel Reply at 7.

area licensees, therefore, need only demonstrate coverage by constructing and operating one frequency at each site, with the exception, noted *supra*, of the channel use requirement for frequencies in the upper 200 channels.

III. CONCLUSION

24. On February 5, 1999, the United States Court of Appeals for the District of Columbia remanded back to the Commission the decision not to extend EA-type construction requirements to incumbent wide-area 800 MHz SMR licensees that had been granted extended implementation. Any incumbent wide-area 800 MHz licensee that was still in its construction period as of the date of that decision may choose to apply either the existing site-by-site, frequency-by-frequency construction requirements or the EA construction requirements. Those licensees who choose the latter must certify in a filing with the Commission their compliance with the requirements within the later of fifteen days from their applicable construction benchmarks or sixty days from the effective date of this decision. Such a certification should include compliance with the channel use requirement, if applicable, and a demonstration of substantial service, if elected.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

25. To assist the public in determining the possible impact on small entities of the requirements adopted in this *Memorandum Opinion and Order on Remand*, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA), set forth in Appendix B. The Office of Public Affairs, Reference Operations Division, will send a copy of the *Memorandum Opinion and Order on Remand*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[72]

B. Paperwork Reduction Act of 1995 Analysis

26. This *Memorandum Opinion and Order on Remand* contains a modified information collection that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

C. Further Information

27. For further information concerning this *Memorandum Opinion and Order on Remand*, contact William W. Kunze, Commercial Wireless Division, Wireless Telecommunications Bureau at (202) 418-0620.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that incumbent wide-area 800 MHz SMR licensees eligible for relief as described herein must comply with the terms of their extended

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[72] *See* 5 U.S.C. § 601 *et. seq.*

implementation authorizations or apply the alternative construction requirements described herein. This action is taken pursuant to the authority of section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i).

29. IT IS FURTHER ORDERED that incumbent wide-area 800 MHz SMR licensees eligible for relief as described herein must certify in a filing with the Wireless Telecommunications Bureau their compliance with the construction requirements as described herein within the later of fifteen days after the licensee's applicable construction deadline or sixty days after publication of this *Memorandum Opinion and Order on Remand* in the Federal Register.

30. IT IS FURTHER ORDERED that the temporary suspension of the construction timetable for incumbent wide-area SMR licensees as set forth in *Public Notice* DA 99-698 released April 15, 1999, is terminated.

31. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, the Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on Remand*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A

LIST OF THE PARTIES

Comments

American Mobile Telecommunications Association, Inc. (AMTA)
Chadmoore Wireless Group, Inc. (Chadmoore)
Mobile Relays, Inc. (Mobile Relays)
Nextel Communications, Inc. (Nextel)
Southern Company (Southern)
William R. Miller d/b/a Russ Miller Rental (Russ Miller)

Reply Comments

Chadmoore Wireless Group, Inc. (Chadmoore)
Nextel Communications, Inc. (Nextel)
Southern Company (Southern)

Ex Parte Filings

Southern Company (Southern)

APPENDIX B

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

To assist the public in determining the possible impact on small entities of the provisions in this *Memorandum Opinion and Order on Remand*, the Commission has prepared this Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA).

A. Need for, and Objectives of, the *Memorandum Opinion and Order on Remand*

This *Memorandum Opinion and Order on Remand* was initiated by order of the United States Court of Appeals for the District of Columbia in the case of *Fresno Mobile Relays, Inc. v. Federal Communications Commission* (*Fresno*).[1] In *Fresno*, the court stated that the Commission had not adequately explained why incumbent wide-area 800 MHz SMR licensees granted extended implementation (EI) must construct and operate all frequencies at all sites or lose the unconstructed frequencies, while Economic Area (EA) 800 MHz SMR licensees need only provide coverage to a certain percentage of the population within their licensed areas. This *Memorandum Opinion and Order on Remand* allows incumbent wide-area 800 MHz SMR licensees who were within their construction periods at the time of the *Fresno* decision to choose between complying with the terms of their EI authorizations or applying construction requirements similar to those given to EA licensees. Therefore, this *Memorandum Opinion and Order on Remand* (1) gives the incumbent licensees greater flexibility to leave certain sites and frequencies unconstructed (for potential future use), (2) establishes reasonable regulatory parity between incumbent wide-area licensees and EA licensees in the 800 MHz SMR service, without prejudicing the interests of either, and (3) provides the 800 MHz SMR service with a degree of certainty for both current and future EA licensees.

B. Summary of Significant Issues Raised by Public Comment in Response to the Initial Regulatory Flexibility Analysis

As noted above, this *Memorandum Opinion and Order on Remand* was initiated by order of the United States Court of Appeals for the District of Columbia. Therefore, there was no Initial Regulatory Flexibility Analysis.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The Regulatory Flexibility Act (RFA) directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by our rules.[2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] A small business concern is one which: (1) is independently owned and operated;

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1 *Fresno Mobile Radio, Inc., et al. v. Federal Communications Commission*, 165 F. 3d 965 (D.C. Cir., Feb. 5, 1999).

2 5 U.S.C. § 603(b)(3).

3 5 U.S.C. § 601(6).

4 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15

(2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[5] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[6] The provisions adopted in this *Memorandum Opinion and Order on Remand* will apply to approximately 30 - 35 current incumbent 800 MHz SMR operators, most of which may be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This *Memorandum Opinion and Order on Remand* gives eligible wide-area 800 MHz SMR licensees the option of complying with the terms of their EI authorizations or applying EA-type construction requirements to their wide area footprints. If a licensee chooses the former, it need only comply with the requirements already imposed by the Commission's rules. If an eligible licensee chooses the latter, it must determine if it meets the coverage requirement and the channel use requirement (if applicable). The licensee must then certify compliance with these requirements in a filing with the Wireless Telecommunications Bureau (Bureau) at its applicable construction deadline. For certain authorized frequencies (*i.e.*, the Lower 230 channels), in lieu of the specific coverage requirements, an eligible licensee may demonstrate that it is providing substantial service. If a licensee chooses this option, it must provide in a filing with the Bureau a description of how it is providing substantial service.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The action taken by this *Memorandum Opinion and Order on Remand* not only gives eligible incumbent wide-area 800 MHz SMR licensees greater flexibility to leave certain sites and frequencies unconstructed (for potential future use), but also establishes reasonable parity between incumbent wide-area licensees and EA licensees in the 800 MHz SMR service. Eligible incumbent licensees need only report their compliance with the construction requirements in the same fashion that EA 800 MHz licensees do (*i.e.*, in a certification and, if the substantial service option is elected, a demonstration).

As described in this *Memorandum Opinion and Order on Remand*, we declined to start the alternative five-year construction period from the effective date of the proceeding, as a number of the licensees suggested in comments filed in the 800 MHz proceeding (PR Docket 93-144).[7] In light of the fact that all of the current EI incumbents have already had several years to build out their systems, the Commission decided that adding five more years to their build-out periods on a cumulative basis would give incumbent wide-area SMR licensees an inequitable

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U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

5 Small Business Act, 15 U.S.C. § 632 (1996).

6 5 U.S.C. § 601(4).

7 *See Memorandum Opinion and Order on Remand* at Section II (¶ 13).

advantage over EA licensees. Therefore, the construction period shall start from the dates of the individual licensees' grants of extended implementation.

In addition, we declined to apply the EA-type construction requirements retroactively, as a comment filed in the 800 MHz proceeding (PR Docket 93-144) suggested, because it would require reinstating licenses that previously reached the expiration of their construction periods and were cancelled for failure to construct, in most cases over two years ago.[8] Reinstating these cancelled licenses would not be in the public interest. Therefore, the Commission will allow any incumbent wide-area 800 MHz SMR licensee who was within its construction period at the time of the *Fresno* decision to apply the alternative construction requirements.

F. Report to Congress

The Commission shall send a copy of this Supplemental Final Regulatory Flexibility Analysis, along with this *Memorandum Opinion and Order on Remand*, in a report to Congress pursuant to the Small Business Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Supplemental Final Regulatory Flexibility Analysis will also be published in the Federal Register.

[8] *See Memorandum Opinion and Order on Remand* at Section II (¶ 19).